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12/2/03
68 FR 67492
(3)

December 30, 2003

Mr. Michael T. Lesar
Chief, Rules and Directives Branch
Division of Administrative Services
Office of Administration
Mail Stop T-6D59
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Re: Comments on Proposed Pilot Program for the Use of Alternative Dispute Resolution in NRC Enforcement Cases

Dear Mr. Lesar:

The NRC has decided to initiate a pilot program to assess the usefulness of Alternative Dispute Resolution (ADR) techniques in certain types of potential enforcement cases, such as those based upon allegations of discrimination against persons who have raised safety concerns, and has requested input on several questions related to this pilot program (see 68 *Federal Register* 67492, dated December 2, 2003). These comments on the proposed pilot program are submitted on behalf of the American Electric Power Company, Southern California Edison Company, STP Nuclear Operating Company, and TXU Corporation.

We strongly support the development of the pilot program. Properly applied, the use of ADR techniques in certain types of enforcement cases (such as "whistleblower" discrimination complaints and cases of alleged wrongdoing) will result in resolutions that are more efficient, more timely, less contentious, fairer to all parties, and more conducive to safety than currently applied enforcement processes. We regard the following as essential to an effective ADR program:

- Certainty that if the parties arrive at a settlement, the NRC will not initiate additional investigations or enforcement regarding the same issue.

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- Certainty that NRC will adopt and confirm the results of ADR settlements absent some gross irregularity such as fraud in procuring the settlement, tainted neutrals, or terms that are contrary to specific NRC requirements.
- Availability of ADR at any stage of enforcement for a wide range of alleged wrongdoing issues, including particularly "whistleblower" issues.
- Confidentiality of ADR proceedings.
- Clear, simple procedures that permit parties to resolve disputes quickly and straightforwardly without multiple proceedings and investigations.
- Flexibility of participants to select among various ADR processes, including mediation, facilitation, arbitration, and simple settlement.
- Ready availability of qualified third-party neutrals who would be acceptable to all parties. These neutrals should include persons not employed by the NRC.

During the December 10, 2003 workshop conducted by the NRC Staff with stakeholders from the industry and representatives of "whistleblowers" and public interest groups, there was broad agreement on many of these points. We believe that if the Commission adopts a program which has these features, it will be widely used and result in resolutions that benefit all parties and serve the public interest.

More specific comments on how these features can be incorporated into the pilot program are presented in the attached response to the NRC's specific questions.

We also support the comments on this topic submitted by the Nuclear Energy Institute on behalf of the nuclear power industry.

We would like the opportunity to participate in any further meetings, or provide further comments, on this issue in the event that the NRC seeks additional input prior to establishment of the pilot program. Also, should you have any questions or wish to discuss these comments, please call me at (202) 739-5454.

Sincerely,

William E. Baer, Jr. /emh

William E. Baer, Jr.

WEB/emh
Enclosure

COMMENTS ON PROPOSED ALTERNATIVE DISPUTE RESOLUTION PILOT PROGRAM DISCUSSION ISSUES

The following are our specific comments in response to the questions asked by the NRC regarding the proposed Alternative Dispute Resolution (ADR) pilot program. All of these comments are premised upon the notion that participation in ADR or settlements is voluntary on the part of the involved parties and that those parties may opt instead to be subject to traditional NRC enforcement processes and will not be penalized for choosing not to participate in ADR.

1. How should cases be selected for the use of ADR?

The NRC should make ADR available as widely as possible. No cases should be exempt. This will both directly benefit the specific parties involved and support nuclear safety.

With respect to allegations that an employee has been discriminated against for having raised safety concerns, ADR should be an option in all cases. Both licensees and affected employees have a strong interest in resolving their disputes as amicably and expeditiously as possible. Under the current NRC enforcement regime, such resolutions are very difficult for several reasons.

- First, like most employment disputes, "whistleblower" discrimination claims are complex and involve multiple issues relating to intent, labor policies, employee performance, working conditions and terms of employment. Many of these issues do not directly relate to safety, and it is often possible to reach compromise solutions that satisfy both the employee and the employer. Unlike ADR, NRC enforcement processes are designed to come to an unambiguous "right or wrong" answer to whether a violation has occurred, even in ambiguous situations where such conclusions are not necessary to satisfy the employee and the licensee. The effect of this situation is often to polarize the employer/employee relationship, leading to a hardening of positions on both sides.
- Second, under the threat of NRC investigation and enforcement, licensees are often reluctant to enter into discussions or compromise with the complaining employee for fear of appearing to interfere in the investigation, having the negotiations themselves become a new subject for investigation, or otherwise exacerbating the situation. The availability of NRC-endorsed ADR would eliminate these concerns.
- Third, the typical investigation and enforcement process for "whistleblower" allegations is lengthy, in many cases stretching out over several years. By the time this process is concluded, harm to the careers and reputations of the alleged "whistleblower," the licensee, and involved licensee personnel may be irrevocable.
- Finally, the polarization of the parties and length of time required to resolve these disputes can create a "chilling" effect on both employees and management. Employees become reluctant to raise allegations of discrimination because they know that it may be many months or years before their allegations are resolved. Managers become reluctant to take appropriate personnel actions because they may become subject to allegations that, even if ultimately shown to be untrue, may cloud their careers indefinitely. The use of ADR, by permitting rapid, amicable settlement of disputes, reduces the impact of these adverse effects upon a safety conscious work environment (SCWE).

For all of these reasons, ADR should be made available as widely as possible in "whistleblower" cases. In these cases, it is only the licensee and the complaining employee who are directly affected. It should be noted that settlement of these cases between the licensee and the complaining employees does not adversely affect the NRC's ability to understand and address any safety issue associated with a "whistleblower" complaint. As is the current practice, when the NRC receives such allegations, the facts relating to safety and technical issues can be immediately referred to the NRC technical staff and inspection personnel for any necessary fact gathering or action. These issues would receive the same scrutiny as other technical issues identified during the NRC oversight and inspection process. The same is true for any NRC concern that a "chilling effect" may have been created by the actions of the licensee toward the complainant. If the NRC identifies a concern in this area, it can be addressed through the agency's standard oversight and inspection processes.

With respect to public records, the benefits of ADR or settlement in resolving discrimination claims fairly and expeditiously outweigh the need for any public proceeding on those matters. Also, those making allegations often do not want their names publicized when it is unnecessary for the redress of their concerns. If necessary, for any associated safety or technical issues, the NRC could create public records of the resolution of those issues consistent with how similar records are created for other safety issues identified during NRC oversight and inspection activities (*i.e.*, resolution of the safety and technical issues could be documented in NRC inspection reports).

The issues in wrongdoing cases are somewhat different from those in "whistleblower" discrimination cases, because there is not a complainant who alleges that he or she has been wronged. The matter is essentially between the NRC Staff, the licensee, and any individuals accused of wrongdoing. Nonetheless, there is no reason why ADR or settlement cannot be similarly used in these cases, as is done by many other regulatory agencies and encouraged by the ADR Act. The use of ADR can resolve these cases in a manner that is fair and in the public interest while consuming far less time and resources from both the NRC Staff and the licensee than would be spent in pursuing formal conferences, submittals, and adjudicatory proceedings.

What ADR process should be used?

Especially in the pilot program, the NRC should leave open the flexibility to use any ADR process agreed upon between the involved parties. These include mediation, facilitation, arbitration, and simple settlement negotiations. The NRC should not prevent involved parties from using whatever processes those parties believe will be most useful in helping to resolve the issues. This flexibility will permit the pilot program to evaluate the usefulness of the various types of ADR.

The NRC can facilitate the use of ADR by providing a suggested list of neutrals who are qualified to conduct each type of ADR. In addition, in the context of "whistleblower" allegations, the NRC can provide information on ADR approaches to the employee in the form of a guide or booklet to help the individual make an informed decision as to the appropriate approach in the particular situation at hand.

What is the appropriate NRC involvement in the early ADR process?

We understand the "early ADR process" to mean ADR in the context of a case in which the NRC has received a "whistleblower" discrimination allegation, and has determined that the allegations, if true, make out a *prima facie* instance of prohibited discrimination, but has not yet initiated an investigation or other enforcement activity. In these circumstances, we believe that the NRC's role should be as follows:

- The NRC should notify the individual of the availability of ADR as a means of resolving the matter with the licensee, and should provide the individual with information on how ADR processes work and persons available to serve as mediators, facilitators, or arbitrators.
- If the individual wishes to pursue ADR, the NRC should offer to contact the licensee on behalf of the individual and inform the licensee that the individual wishes to participate in ADR. At this point, the licensee and the individual can between themselves determine what ADR mechanisms might be appropriate and how to proceed. The NRC would not have a role in the conduct of the ADR or the formulation of any agreement between the involved parties.
- If the individual and licensee agree to pursue ADR, NRC investigation and enforcement activities with respect to the allegation of discrimination are stayed pending the outcome of ADR. However, as noted earlier, the NRC remains free to evaluate and address any technical or safety issues through its normal inspection and oversight processes.
- Once a settlement agreement has been reached, the NRC can review the agreement, and, unless it contains any terms and conditions contrary to NRC regulations (such as the requirement that such agreements not prevent the employee from raising concerns), accept that agreement as the resolution of the "whistleblower" discrimination allegation, with no further NRC investigation or enforcement action on that issue. Consistent with existing NRC policy, the NRC should support these settlements and use them as the basis for resolving issues. The NRC should not perform any *de novo* review of the facts or basis for the settlement; such a practice would undermine the purpose of ADR and discourage its use.
- Publication of these settlements and associated details would substantially discourage the use of ADR by both employees and licensees and could undermine the ability of the parties to reach agreement. Accordingly, public release of information regarding the terms of settlements should be limited to a concise summary. Personnel and financial information should not be included in any release of information regarding the settlement. We believe that this approach is consistent with the FOIA and the NRC's implementing regulations (*e.g.*, 10 CFR 2.790(a)(4) and (6)).

We believe that this approach will facilitate the use of ADR and help reach resolutions that are mutually satisfactory to the licensee and the employee in a timely fashion, with a minimum of regulatory complication and barriers. Also, the NRC does not have the authority to provide personal remedies to complainants, so it would be inappropriate for the NRC to participate in ADR or negotiations between parties which are directed to that end.

Past licensee performance or SCWE concerns should not affect this approach. The NRC can better address those issues through its ordinary oversight and inspection processes rather than by involving itself in the negotiation of the resolution of a particular dispute.

Who should participate in the ADR process?

As noted above, in the "early ADR" process, the participants should be the affected licensee and the employee who is alleging discrimination. This approach provides the best likelihood of a timely, efficient, and mutually agreeable resolution. Also, the NRC has no authority to provide personal remedies to the employee; such authority has been vested in the Department of Labor. However, once the NRC conducts an investigation or initiates enforcement activities, the matter is no longer primarily between the employee and the licensee, but between the licensee and the NRC. Accordingly, it would be inappropriate to provide an employee with a right to "approve" a settlement between a licensee and the NRC, because it is the agency, and not the employee, which has the duty and authority to determine whether a violation has occurred and what the appropriate regulatory response should be. Such an approach would also create a strong disincentive to licensees to enter into ADR. However, the employee could be consulted by the NRC to provide any needed additional information and confirm facts.

As to industry's role in ensuring the success of ADR, both the industry and representatives of "whistleblowers" and public interest groups are strongly in favor of the use of ADR to resolve disputes in an efficient, fair, and timely manner. NRC licensees have consistently urged the NRC to make such mechanisms available, and stand ready to participate in the pilot program to the extent that program is structured so as to provide real benefits to ADR participants. Once the pilot program is concluded, we would be glad to participate in the assessment of that program and in the formulation of a permanent program.

How should neutrals be selected?

In general, the parties should be free to select their own neutrals, so long as both the licensee and the employee (in "early ADR"), or the licensee and the NRC Staff (in other cases), concur in the selection. This will permit the selection of neutrals the parties believe are most likely to help them achieve successful resolution of the matter.

We believe that that parties must have the option of selecting neutrals who are not NRC employees. Some parties may believe that there is an inherent conflict of interest, or at least the appearance of such conflict, in using NRC employees as neutrals when the agency is or may later become the charging party in the enforcement action. Accordingly, reliance only on NRC employees for this purpose is likely to discourage the use of ADR. Also, use of NRC employees for this purpose in the context of "early ADR" may be inappropriate because it risks involvement of the NRC in fashioning personal remedies, which the NRC has not been authorized to do.

However, we believe that it would be useful for the NRC, in consultation with the industry and with representatives of "whistleblowers" and public interest groups, to compile a list of qualified persons who might be selected to serve as neutrals. The list could include a short biography or background on each individual. Parties could select neutrals from this list, but would not be

bound to do so, and could select others to serve as neutrals (or agree to negotiate without a neutral) if they so choose. This list could include personnel from other government agencies. The NRC might suggest the types of qualifications that might be appropriate for neutrals, such as experience in nuclear matters or labor and employment law or counseling experience.

With respect to payment of neutrals, for purposes of the pilot program we believe that the NRC should pay the cost of the neutral. This approach will reinforce the reality and appearance of the independence of the neutral, and permit "whistleblower" complainants to participate in ADR without an undue financial burden. Payment by the NRC is also appropriate because the pilot program is being undertaken to assess the value of ADR for the public and reducing costs and burdens for the NRC Staff, the nuclear industry, and other stakeholders. The NRC payments could be made from funds derived from general license fees, rather than charged to particular licensees.

How should confidentiality be maintained?

As noted in the NRC's paper on ADR pilot program discussion issues, "[a] hallmark of ADR is the confidentiality of the process. Allowing parties to communicate in confidence facilitates the free flow of information and encourages greater candor between the parties." To be effective, any ADR program supported by the NRC must ensure that confidentiality of ADR and negotiations is maintained.

With respect to ADR between the NRC Staff and a licensee or individual, the NRC program should be structured so as to maintain this confidentiality to the maximum extent possible. For other cases (early ADR), the parties can mutually agree upon the level of confidentiality under which they wish to conduct ADR, and the NRC program should be structured so as to avoid any breach of this confidentiality. No doubt in most cases the parties will elect to agree upon the maximum confidentiality permitted by law, and the NRC's program should not compromise the ability of the parties in this respect. In particular, the NRC should establish any settlement review process so that settlement terms involving confidential personnel and financial information are protected from public disclosure. Specific provisions describing the basis for exemption of such information from disclosure under the FOIA, or other public disclosure, should be included in the pilot program documents.

In general, to facilitate the use of ADR and promote open and candid negotiations, we believe that there should be no public information released concerning ADR proceedings. However, after a resolution is reached, the NRC could publish information concerning the nature of the issue, noting that it has been resolved, and summarizing the general terms of the agreed resolution (without disclosing specific financial or personnel matters). This release of information could be on the NRC website or in the Federal Register.

How will NRC internal management procedures be impacted?

In general, we take no position on the particulars of how the NRC internal management related to ADR should be conducted. But the manner in which NRC structures its personnel, guidelines, and processes to support ADR should support efficient, fair, and timely resolutions. This implies

that those NRC personnel who participate in ADR should be well-versed in the methods and goals of ADR, authorized to negotiate and consummate settlements, and that NRC processes and guidelines should not be so inflexible or complex as to deter participation in ADR or prevent timely resolutions.

How will the program be coordinated with the NRC enforcement process?

If elected by the employee and licensee, "early ADR" should essentially substitute for the NRC enforcement process with respect to claims of discrimination for raising safety concerns. In these cases, if the parties reach a mutually acceptable settlement, and the terms and conditions included in the settlement are not contrary to NRC regulations, the NRC would accept that settlement as the basis for closure of the allegation, and no further investigation or enforcement action should be taken with respect to the allegation of discrimination. With respect to any ancillary safety or "chilling effect" concerns, the NRC can address those concerns through its ordinary oversight and inspection processes.

With respect to ADR between a licensee or individual and the NRC Staff, the enforcement process would generally operate as it currently does, with the exception that normal enforcement activities will be suspended at whatever stage the parties agree to pursue ADR. If an agreed resolution is reached through ADR, that resolution would be accepted as the resolution of the enforcement action, and the enforcement action would be closed on that basis. If an agreed resolution is not reached, the enforcement process should resume.

Both in the context of "early ADR" and ADR with the NRC Staff, the option of ADR should not preclude other types of settlement discussions (which should themselves be viewed as a form of ADR). Any settlement between the parties that is reviewed and accepted by the NRC should result in closure of the NRC enforcement action for that matter on the basis of the settlement. Any other approach would strongly discourage settlements.

What training will be done?

We do not believe that training is generally necessary or is an efficient method for informing licensees, employees, and neutrals about ADR programs. Instead, the NRC should develop and provide materials, perhaps in booklet form, describing how ADR works in the context of employee allegations of discrimination, and what options are available to employees and licensees.

How will the program be evaluated?

We agree that the pilot program results should be evaluated prior to establishing a permanent program. The pilot program should be allowed to operate for a reasonable period of time (perhaps two years) and permit the use of ADR in as many cases as possible so that it provides enough data for useful evaluation of its effectiveness as a whole. The evaluation should address:

- ease of use of the program by parties seeking to resolve disputes
- timeliness of dispute resolution

- cost savings to licensees, the agency, and employees
- level of use of the program and additional steps that might be taken to encourage use of ADR
- effectiveness in achieving resolutions that are consistent with NRC's regulatory responsibility for safety

The NRC should continue to permit the use of ADR while the evaluation is conducted.